

This Opinion is Not a
Precedent of the TTAB

Mailed: July 8, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board

In re Lifestyle Enterprises, Inc.

Serial No. 87952218

Howard A. MacCord, Jr. of MacCord Mason PLLC
for Lifestyle Enterprises, Inc.

Daniel Donegan, Trademark Examining Attorney, Law Office 104,
Zachary Cromer, Managing Attorney.

Before Adlin, Lynch and Dunn, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant Lifestyle Enterprises, Inc. seeks registration of DIVANY, in standard characters, for “furniture.”¹ The Examining Attorney refused registration under Section 2(e)(1) of the Trademark Act, on the ground that Applicant’s proposed mark is merely descriptive of its identified goods. After the refusal became final, Applicant appealed, and its appeal is fully briefed. We affirm the refusal to register, but based on a different theory of descriptiveness than articulated by the Examining Attorney, i.e. without applying the doctrine of foreign equivalents.

¹ Application Serial No. 87952218, filed June 7, 2018 under Section 1(b) of the Trademark Act, based on an alleged intent to use the mark in commerce.

I. The Examining Attorney's Refusal Based on the Doctrine of Foreign Equivalents

The Examining Attorney relies on evidence that “dívány” is Hungarian for “couch.” May 16, 2019 Office Action TSDR 10-19. Furthermore, some translation sites indicate that “divany,” without the diacritical marks above the “i” and “a” (as the proposed mark is shown on the involved application’s drawing page), is Hungarian for “couch.” *Id.* The Examining Attorney argues that because Hungarian is a “common, modern language,” and that “consumers would stop and translate” Applicant’s proposed mark from Hungarian to English, under the doctrine of foreign equivalents the term merely describes a type of furniture. *See e.g. In re Thomas*, 79 USPQ2d 1021, 1024 (TTAB 2006) (discussing the doctrine of foreign equivalents).

The Examining Attorney also required Applicant to provide an English translation of the proposed mark under Trademark Rule 2.32(a)(9), which provides that if a mark “includes non-English wording,” an application to register the mark must include “an English translation of that wording.” Finally, the Examining Attorney required Applicant to submit an additional processing fee under Trademark Rules 2.6(a)(1)(v) and 2.22(a)(15) and (c), because Applicant’s failure to provide the required translation statement made the application ineligible for the discounted fees accorded TEAS Plus applications.

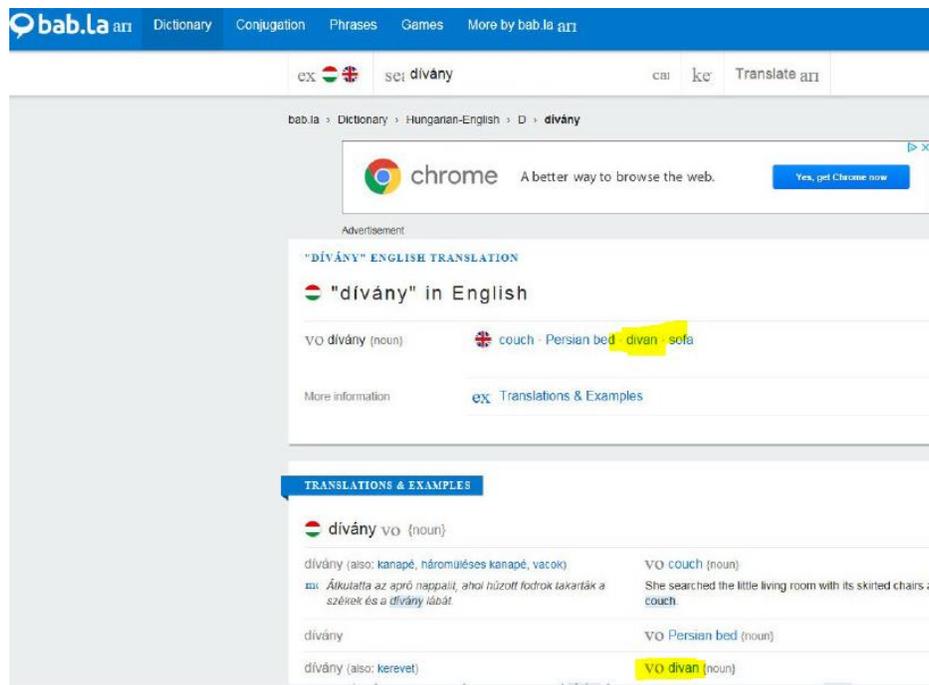
Applicant argues that the doctrine of foreign equivalents does not apply. Specifically, it points out that its involved mark (without diacritical marks) is not the Hungarian word “dívány” (with diacritical marks), and argues that the term is instead “coined.” Applicant further argues that in any event, because there are

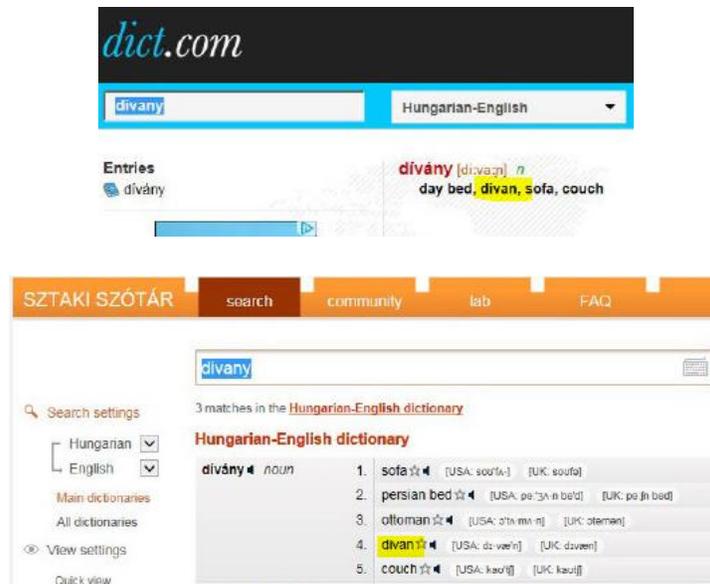
relatively few Hungarian speakers in the United States (under 100,000), “there is no substantial portion of the intended audience that could stop and translate DIVANY into couch, much less furniture.” 5 TTABVUE 11-12. Because it claims that DIVANY is a coined term rather than a Hungarian word, Applicant argues that a translation is “inappropriate” and that the application remains TEAS Plus-eligible.

II. The Proposed Mark is Merely Descriptive Independent of the Doctrine of Foreign Equivalents

While the Examining Attorney based the descriptiveness refusal on the doctrine of foreign equivalents, we “need not adopt the rationale of the Examining Attorney.” *In re AFG Ind. Inc.*, 17 USPQ2d 1162, 1163 (TTAB 1990); *In re Avocet, Inc.*, 227 USPQ 566, 567 (TTAB 1985). Here, we find that Applicant’s proposed mark is merely descriptive without regard to its meaning in any foreign language.

In fact, the dictionary definitions submitted by the Examining Attorney reveal that “divan” is an English word which means “couch” or a similar type of furniture:





May 16, 2019 Office Action TSDR 10, 13, 15. This meaning is confirmed by English-language dictionary definitions which indicate that “divan” means “a sofa or couch, usually without arms or back, often usable as a bed.”²

“A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used.” *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); *In re Abcor Dev.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). The question of descriptiveness is not evaluated in the abstract, but instead “in relation to the particular goods for which registration is sought, the context in which it is

² See, e.g., dictionary.com/browse/divan. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *Threshold TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1038 n.14 (TTAB 2010).

being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use.” *In re Chamber of Commerce*, 102 USPQ2d at 1219 (quoting *In re Bayer AG*, 82 USPQ2d at 1831)).

Here, Applicant seeks registration of DIVANY rather than the word “divan.” This case therefore calls to mind *In re Bayer AG*, 82 USPQ2d at 1831, in which the Federal Circuit affirmed the Board’s refusal to register ASPIRINA for analgesics because it is merely descriptive. The Court found that substantial evidence supported the Board’s finding “that ASPIRINA and aspirin are sufficiently close in appearance, sound, and meaning that [t]he mere addition of the letter 'A' at the end of the generic term 'aspirin' is simply insufficient to transform ASPIRINA into an inherently distinctive mark for analgesics.” Here, just as the mere addition of the letter “A” at the end of “aspirin” was not enough to make the term inherently distinctive in *In re Bayer AG*, Applicant’s mere addition of the letter “Y” at the end of “divan” is not enough to convert DIVANY into an inherently distinctive term.³

³ Misspellings are often not enough to make a descriptive term non-descriptive. *See generally Nupla Corp. v. IXL Mfg. Co.*, 114 F.3d 191, 42 USPQ2d 1711, 1716 (Fed. Cir. 1997) (“Nupla’s mark [CUSH-N-GRIP], which is merely a misspelling of CUSHION-GRIP, is also generic as a matter of law”); *In re Carlson*, 91 USPQ2d 1198, 1203 (TTAB 2009) (“applicant’s applied-for mark, URBANHOUSING in standard character form, will be immediately and directly perceived by consumers as the equivalent of the admittedly descriptive term URBAN HOUSING, rather than as including the separate word ZING”); *In re Ginc UK Ltd.*, 90 USPQ2d 1472, 1475 (TTAB 2007) (“The generic meaning of ‘togs’ is not overcome by the misspelling of the term as TOGGS in applicant’s mark. A slight misspelling is not sufficient to change a descriptive or generic word into a suggestive word.”).

There is another, perhaps more important reason why Applicant's misspelling is insufficient to render Applicant's proposed mark inherently distinctive for furniture. When "y" is used as a suffix, as it is in the proposed mark, it often signals that something is "like" or "characterized by" the term to which the suffix is added.⁴ For example, something that is "sticky" sticks to other things, something that is "juicy" includes a good deal of juice or has juice-like qualities, something that is "dirty" may be covered in dirt or otherwise unclean and something that is "salty" tastes like or contains a fair amount of salt. In this case, a consumer who knows that Applicant offers furniture will understand DIVANY as conveying that Applicant's goods include divans, or divan-like pieces of furniture. *See DuoProSS Meditech Corp. v. Inviro Medical Devices Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) ("The question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods or services are will understand the mark to convey information about them.") (quoting *In re Tower Tech Inc.*, 64 USPQ 2d 1314, 1316-17 (TTAB 2002)). In other words, the term describes characteristics of Applicant's goods, or the goods themselves.

III. Conclusion

There is no doubt that DIVANY – a slight variation of the English-language word "divan," which conveys that Applicant's identified "furniture" includes divans or

⁴ This is illustrated by dictionary definitions of "-y", including merriam-webster.com/dictionary/-y, of which we take judicial notice.

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divan-like pieces – is merely descriptive. We need not reach the refusals based on Applicant’s failure to provide an English translation or an additional fee. *In re Mueller Sports Med., Inc.*, 126 USPQ2d 1584, 1590 (TTAB 2018).

Decision: The refusal to register Applicant’s mark under Section 2(e)(1) of the Trademark Act is affirmed.